



Washoe County
Department of
Water Resources
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March 16, 2010

Jason King, P.E.
Acting State Engineer
901 South Stewart Street, Suite 2002
Carson City, NV 89701

Subject: March 16th, 2009 Workshop

Dear Jason:

The attachment herewith presents certain facts relating to potential negative impacts of the Supreme Court ruling in the matter of *Great Basin Water Network, et al. v. State Engineer and Southern Nevada Water Authority*, 126 Nev., Advance Opinion 2 (the Ruling) on Washoe County and its water rights holdings. The attachment also provides some thoughts and ideas for the workshop.

Please do not hesitate to contact me at 954-4647 with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Vahid Behmaram", is written over a horizontal line.

Vahid Behmaram
Water Rights Manager

Attachment

cc. Rosemary Menard, Director
Peter Simeoni, Deputy District Attorney

Washoe County Department of Water Resources (WCDWR) operates 18 distinct water systems within 7 different hydrographic basins in southern Washoe County.

Washoe County holds in excess of 27,000 acre-feet of water rights associated with these water systems.

WCDWR also operates several water reclamation facilities. In accordance with the provisions of NRS, WCDWR has appropriated in excess of 5,500 acre-feet of treated effluent for purpose of providing reuse water supply to golf courses and other irrigation purposes. The reuse program also requires appropriation of return flow water rights. WCDWR holds in excess of 1,500 acre-feet of return flow water rights which are intended to satisfy the demands of down stream users of water within the Truckee River system, as decreed in the *United States v. Orr Water Ditch Co., et al, In Equity, No. A-3*, in the United States District Court for the District of Nevada (the "Orr Ditch Decree").

The appropriations referenced above are granted through filing of water rights applications with the office of the Nevada State Engineer. WCDWR holds in excess of 2500 permits, certificates and applications with the State Engineer.

The Ruling

On January 28, 2010, the Nevada Supreme Court issued its opinion in the matter of *Great Basin Water Network, et al. v. State Engineer and Southern Nevada Water Authority*, 126 Nev., Advance Opinion 2 (the Ruling). According to preliminary data from the State Engineer's office, a broad interpretation of this ruling could render approximately 14,600 existing permits, certificates and denied applications (statewide) as null and void. The data from the State Engineer also indicates that of the approximately 14,600 such permits, certificates and denied applications (statewide), 3101 are within Washoe County and quite possibly a large number of WCDWR's 2500 appropriations are within the 3101 affected by the ruling. It should be noted that many of the potentially affected permits have been approved by WCDWR and the State Engineer and support many approved, built and occupied developments, both residential and commercial in nature.

Reasons for re-consideration by the court

Nevada Revised Statutes (NRS) 533.370 (2) in part states that "the Nevada State Engineer shall approve or reject each application within 1 year after the final date for filing a protest." NRS did not define the consequences if the State Engineer does not act on an application within the prescribed period until the inclusion of certain amendments in 2003. Existing precedent within the office of the State Engineer since the enactment of this provision of the law in 1947 until 2003 when the issue was legislated, has been that an application not acted upon within the 1 year time period after the end of protest period is "Pending" and the State Engineer has in 14,600 instances has proceeded to approve or reject such "Pending" applications after the 1 year time period has lapsed. It should be noted that often times complex title issues relating to the Orr Ditch Decree water rights prevents action by the State Engineer within the 1 year time period.

In summary the Ruling concludes and defines that an application pending before the State Engineer is no longer pending 1 day after the end of the 1 year time period after the end of protest period. However this conclusion is not consistent with other provisions of the NRS.

In general NRS recognizes 5 different statuses for any appropriation of water rights (acknowledging that “forfeiture” is a post appropriation process and “vested” rights require an adjudication process) :

- 1) Permitted
- 2) Denied
- 3) Cancelled
- 4) Withdrawn
- 5) Pending application

A Permit is granted when the State Engineer upon review and in accordance with NRS signs and affixes his seal to a pending application.

An application may be denied, in accordance with the provisions of NRS, upon issuance of a ruling by the State Engineer. The ruling by the State Engineer is an appealable act.

Cancellations are only as a direct result of non compliance by the applicant. A cancellation is also an appealable act.

Withdrawn status is as a result of written request of the owner of the water right.

Therefore, absent any of these 4 states, an application is considered to be pending.

The Ruling in effect creates a sixth category, of “lapsed” status. This interpretation is inconsistent with the provisions of NRS 533. 370 because it states that the “*State Engineer Shall Approve or Reject...*”

Simple inaction by the State Engineer as a means of rejection of an application is not provided for in the NRS and not an appealable act. Furthermore, the proposed “lapsed” status by the court will create too many circumstances that are inconsistent with the prior appropriation doctrine which is so fundamental to the Nevada water law.

Standing, Intervention and provisions of protest period

The Ruling recognizes that applications pending determination by the State Engineer for prolonged periods of time may have negative impacts on people or entities without standing in the State Engineer hearings. The ruling proposes to possibly remedy this circumstance with reopening of the protest period.

This issue has been legislated prospectively in NRS 533.370 .(8). Any proposed language to apply this section retroactively should consider the following:

- 1) The reopening of the protest period as described in NRS 533.370.(8) may only occur once
- 2) Exempt those applications held in abeyance by deliberate act of the State Engineer in accordance with prior rulings and court findings to conduct studies or observe monitoring results.